



**Supreme Court of the United States**

**OCTOBER TERM, 1967**

**JAN 22 1968**

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**No. 508**

**THELMA LEVY, in her capacity as Administratrix of the succession of LOUISE LEVY and as tutrix of and on behalf of the minor children of LOUISE LEVY, said children being: RONALD BELL, REGINA LEVY, CECILIA LEVY, LINDA LEVY and AUSTIN LEVY,**

**versus**

**THE STATE OF LOUISIANA through the CHARITY HOSPITAL OF LOUISIANA at NEW ORLEANS BOARD OF ADMINISTRATORS and W. J. WING, M.D., and A. B. C. INSURANCE COMPANIES.**

**Appeal from the Supreme Court of Louisiana.**

**BRIEF OF APPELLEE.**

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**Appeal from the Supreme Court of Louisiana.**

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**BRIEF OF APPELLEE.**

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**STATEMENT OF THE CASE.**

Appellant brought this action under Louisiana Civil Code Article 2315 alleging that she was tutrix of the minor children of decedent, Louise Levy, and hence entitled to recover for the wrongful death of Louise Levy. The children were concededly illegitimate. Appellees excepted to the petition and their exceptions were sustained. An appeal was taken by the appel-

lant only as against Dr. Wing and Interstate Fire and Casualty Company. The Court of Appeal, Fourth Circuit, affirmed the judgment of the lower court and denied appellant a right or cause of action under Article 2315 because of illegitimacy of the minor children. Appellant then sought review in the Supreme Court of Louisiana and was denied a writ of certiorari. From this denial, an appeal to the Supreme Court of the United States was taken.

### **SUMMARY OF ARGUMENT.**

Louisiana's wrongful death statute both under the Civil Code and court interpretation has denied illegitimate children a right of action for the wrongful death of a parent. No discrimination or racial overtones have characterized the administration of that statute. Illegitimates of all races have been treated equally and impartially.

Louisiana has evidenced a concern for illegitimate children and has provided a simple and effective manner whereby they can be legitimated and admitted to family status. Because the children involved herein were illegitimate and never legitimated there existed no bar to an action for wrongful death under Article 2315 of the Civil Code. The action was time barred by the failure of an illegitimate relative to sue within the peremptive period.

The attack on the statute as unconstitutional is grounded upon four arguments none of which appellee

submits are valid. The statute is not a racial statute and does not discriminate on the basis of color. Further, the statute does not deprive the illegitimate children of their property without due process of law. The statute is not a penal statute penalizing persons on account of their status. Finally, Louisiana has fully protected and preserved the basic human rights of illegitimates and has undertaken to protect illegitimates in a manner consistent with the general law of Louisiana.

Article 2315 of the Civil Code is not an invidious discrimination. Its classification is reasonable and related to a legitimate legislative purpose. The reasonableness of the classification and the relationship to a legitimate legislative end are presumed. There is no proof that the statute is administered in an arbitrary manner. Louisiana, in the entirety of its legal system, has sought to balance the interests of the illegitimate with those of the society as a whole. In a state whose legal system so closely connects family status with property rights, the requirement of legitimacy and problems of status generally are of vast importance. Other states have employed the classification with regard to inheritance and wrongful death.

Finally, the Court should exercise its own restraint and not employ the Fourteenth Amendment as a vehicle for taking national cognizance of matters historically and traditionally of state concern only. Statutes granting recovery for wrongful death and inheritance are traditionally and historically within the exclusive province of the individual states.

**ARGUMENT.**

**MAY IT PLEASE THE COURT:**

**POINT I.**

**LOUISIANA'S WRONGFUL DEATH STATUTE AND HER LAWS OF LEGITIMATION PROTECTED THE RIGHTS OF THE PARTIES TO THIS LITIGATION.**

**I. ILLEGITIMATE CHILDREN REGARDLESS OF RACE HAVE NO RIGHT OR CAUSE OF ACTION UNDER ARTICLE 2315 OF THE LOUISIANA REVISED CIVIL CODE OF 1870.**

**(a) A Right Or Cause Of Action For Wrongful Death Did Not Exist At Common Law Or Civil Law And Is Solely A Creation Of State Statutory Law And Must Be Construed Strictly.**

The Common Law did not grant a right or cause of action for wrongful death. The Civil Law was to the same effect. *Panama R. Co. vs. Rock*, 266 U. S. 209, 45 S.Ct. 58, 69 L.Ed. 250 (1924). As a result, the right and cause of action for wrongful death is a creature of statute. See Voss, *The Recovery of Damages for Wrongful Death at Common Law, at Civil Law, and in Louisiana*, 6 Tul. L. Rev. 201 (1932). According to Judge Dawkins of the Western District of Louisiana, "To begin with the cause of action under Article 2315—originally non-existent under civil or common law . . . was created by the Legislature in derogation of common or civil right. Therefore, as the Louisiana courts repeatedly have said, it must be

narrowly, strictly construed . . . . cause of action for wrongful death, created by Article 2315, is substantive, purely personal, and accrues only to the beneficiaries named, in the order of their naming." *Bounds vs. T. L. James & Co.*, 124 F.Supp. 563, 567 (W.D. La., 1954).

The action for wrongful death is purely statutory in Louisiana, being found in Article 2315 of the Revised Civil Code of Louisiana. *Premeaux vs. Henry Ford & Son*, 155 La. 106, 98 So. 856 (1924); *Thaxton vs. Louisiana Ry. & Nav. Co.*, 153 La. 292, 95 So. 773 (1923); *Van Amburg vs. Vicksburg S. & P. R. Co.*, 37 La. Ann. 650 (1885); *Hubgh vs. New Orleans & C. R. Co.*, 6 La. Ann. 495 (1851).

This statute governs all rights and causes of action for wrongful death and is to be construed *sui generis* and strictly. *Maher vs. Schlosser*, 144 So.2d 706 (La. App. 1962); *Young vs. McCullum*, 74 So.2d 339 (La. App. 1954); *Conrad vs. Citizens Cas. Co. of N.Y.*, 141 F.Supp. 166 (E.D. La. 1956); *Miller vs. American Mut. Liab. Ins. Co.*, 42 So.2d 328 (La. App. 1949); *Reed vs. Warren*, 172 La. 1082, 136 So. 59 (1931); *Kerner vs. Trans-Mississippi Terminal R.R.*, 158 La. 853, 104 So. 740 (1925); *Flash vs. Louisiana Western Ry. Co.*, 137 La. 352, 68 So. 636 (1915); *Chivers vs. Roger*, 50 La. Ann. 57, 23 So. 100 (1898).

Louisiana conferred the action for wrongful death and prescribed the terms upon which the action



might be asserted. In this regard, a Pennsylvania court held:

"It must be remembered that at common law there was no right on the part of survivors to sue for their father's or husband's death and they must now take the privilege upon the terms granted by the . . . legislature . . . and one of those terms is that the parties must be lawful children or a lawful widow. Petitioners have found no cases which give illegitimate children any right to recover in a death action and we believe there are no such." *Kemmerer vs. Reading Co.*, 64 Pa. D & C 433, 23 Lehigh Co. L.J. 5 (1948).

**(b) Article 2315 Defines Rights In Terms Of Status And Makes No Exceptions Based Upon Particular Factual Situations.**

The law creating the action for wrongful death and the right to assert that action speaks of its beneficiaries only in terms of status. It speaks of a "surviving spouse and child or children," the "surviving father and mother of the deceased" and the "surviving brothers and sisters of the deceased." Article 2315. The law does not attempt to make any distinctions based upon the loving father or mother and the less attentive parent, the loyal and disloyal child, the unfaithful and faithful wife, the unconcerned as opposed to the dedicated brother or sister. The law is blind to the personal qualities that may color and distinguish a relationship; it asks only that the relationship exist, and, therefore, the status.



Article 2315 makes no racial distinctions on its face. To persons occupying a given status it accords equal rights. There is no distinction as between white or colored or oriental or Indian children or surviving spouses. The Article asks only that the status exist.

In matters of family law, status is the starting point. In speaking of matters involving law generally and family law in particular Justice Holmes declared, "All rights are consequences attached to filling some situation of fact." Holmes, *The Common Law* 340. At Roman Law status was likewise all important. Buckland, *The Main Institutions of Roman Private Law* 54. In their monumental work concerning the history of English legal institutions Pollock and Maitland stress the importance of correct familial status as determinative of legal rights. Pollock and Maitland, *II History of English Law* 240 et seq. (2nd Ed.).

**(c) "Child" As Used In Article 2315 Of The Revised Civil Code Of 1870 Means Legitimate Child, And Has No Reference To Race Whatsoever.**

Speiser in his work *Wrongful Death* declares:

"Tiffany, in his pioneer treatise on wrongful death, comments that 'a bastard is not a "child," within Lord Campbell's Act.'

If there is a general rule today, it is probably that the word 'child' or 'children' when used in a statute pertaining to wrongful death benefi-

aries, refers to a legitimate child or to legitimate children, and thus only legitimates can recover for the wrongful death of their parents. This is merely an application of the principle that statutes patterned after Lord Campbell's Act which use the word 'kin' mean legitimate kin, and that where such statutes say 'father' or 'mother,' 'children,' 'brothers' or 'sisters,' they mean only legitimate father, mother, children, brothers or sisters." Speiser, *Wrongful Death*, § 10.4, 537. See, also, 72 A.L.R. 2d 1235.

In Article 3556 of the Louisiana Civil Code the term "children" does not include natural children unless such natural children have been legitimated.

Louisiana's jurisprudence is replete with cases which indicate that "child" means legitimate child and that illegitimate children may not recover for the wrongful death of a parent. *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964); *Carter vs. Canal Ins. Co.*, 154 So.2d 476 (La.App. 1963); *Carter vs. Musso*, 151 So.2d 97 (La.App. 1963); *Scott vs. La Fontaine*, 148 So.2d 780 (La.App. 1963); *Buie vs. Hester*, 147 So.2d 733 (La.App. 1962); *Cheeks vs. Fidelity and Casualty Co. of New York*, 87 So.2d 377 (La.App. 1956); *Jackson vs. Lindlom*, 84 So.2d 101 (La.App. 1956); *McConnell vs. Webb*, 226 La. 385, 76 So.2d 405 (1954); *Board of Port Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953); *Thompson vs. Vestal Lumber and Mfg. Co.*, 16 So.2d 594, aff'd. 208 La. 83, 22 So.2d 842 (1944). It is well settled that a right of recovery in favor of a child or children under

Article 2315 of the Civil Code is limited to a legitimate child or children. *Thompson vs. Vestal Lumber and Mfg. Co.*, 208 La. 83, 22 So.2d 842 (1944); *Youchican v. Texas and Pacific Ry. Co.*, 147 La. 1080, 86 So. 551 (1920); *Green vs. New Orleans S & G.I.R. Co.*, 141 La. 120, 74 So. 717 (1917); *Landry v. American Creosote Wks.*, 119 La. 231, 43 So. 1016 (1907); *Lynch vs. Knoop*, 118 La. 611, 43 So. 252 (1907).

The courts of the United States in passing on the question have denied illegitimates or their parents a right or cause of action under Article 2315 of the Civil Code. *Glonn vs. American Guarantee & Liability Insurance Co.*, 379 F.2d 545, cert. granted (5th Cir. 1967); *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La. 1965); *Evans vs. United States*, 100 F. Supp. 5 (W.D. La. 1951).

The strength of the requirement of legitimacy is evidenced by the fact that children of a putative marriage may not recover under Article 2315. Putative children must be legitimated. *Chivers vs. Couch Motor Lines*, *supra*; *Carter vs. Musso*, *supra*; *Buie vs. Hester*, *supra*; *Jackson vs. Lindlom*, *supra*.

It makes no difference that the illegitimate child was dependent upon the parent for support. *Board of Port Commissioners vs. City of New Orleans*, *supra*.

Acknowledgment will not serve to cure a defect in legitimacy. *Lynch vs. Knoop*, *supra*; *Scott vs. La Fontaine*, *supra*; *Cheeks vs. Fidelity and Casualty Co. of New York*, *supra*.

In the legal history of Article 2315 as reflected in the case law there is not the slightest suggestion that the requirement of legitimacy is intended as some form of covert discrimination against the colored race. The decisions are uniform in their applicability. The question of race enters none of the jurisprudence.

**(d) Louisiana Has Long Denied A Right Or Cause Of Action To Illegitimates Without Regard To Race, Color Or Creed.**

The jurisprudence just cited goes back to 1907 when *Lynch vs. Knoop*, *supra*, was decided. Had the interpretation of Article 2315 by the courts as requiring legitimacy been incorrect, it only stands to reason that the legislature of Louisiana would have seen fit to so alter the codal article so as to permit a recovery. In *Abraham vs. Connecticut Fire Ins. Co.*, 177 So.2d 295, (La.App. 1965), it was declared:

"The statute being *sui generis*, this court is not at liberty to question the wisdom of the legislature in confining, restricting and limiting the benefits of the law to those classes of relations expressly enumerated. Conceding the authority of the legislature to include illegitimate relations within the scope of the statute if that body so desires, it nevertheless remains it has not as yet seen fit to do so. We can only conclude, therefore, that the legislature did not intend to extend to illegitimate or natural brothers and sisters the initial right of survivorship of those actions as encompassed in subject statute." 177 So.2d at 302.

See also, *Cheeks vs. Fidelity & Casualty Co. of N.Y.*, 87 So.2d 377 (La.App. 1956). A close examination of the decisions cited in the preceding sections fails to disclose any concern for the race of the parties. The decisions require only that the proper status exist.

**(e) Because Louise Levy Treated Her Children As Though They Were Legitimate And Loved Them, There Exists No Basis For Making An Exception To The Rule Of Legitimacy And To Do So Would Be To Practice Prohibited Discrimination.**

The children on whose behalf this action was brought were concededly illegitimate. But it has been argued that because their mother loved them and sacrificed for them and treated them as though they were legitimate, they should be admitted to that status to which legitimates are entitled, namely, a right and cause of action for wrongful death.

Undoubtedly many mothers have loved their illegitimate children, have sacrificed for them and have treated them as legitimate. But the quality of the relationship between parent and child should not be permitted to overcome the inadequacy of status. See, *Youchican vs. Texas & Pacific Ry. Co.*, 147 La. 1080 86 So. 551 (1920). As pointed out earlier: putative children may not recover, dependent illegitimate children may not recover, and acknowledged children may not recover. Surely these putative, dependent and acknowledged children were loved by the parent who sacrificed for the child and who treated the child



as legitimate. But Louisiana has not granted exceptions in those cases and there exists no reason why it should do so in this case.

To grant the right and cause of action to illegitimate children whose parent loved and sacrificed for them and to withhold it from those less fortunate would be to discriminate between illegitimates and thus deny to some illegitimates that equal protection of the laws and due process of law which the Levy children invoke herein.

## **II. UNDER LOUISIANA LAW THE LEVY CHILDREN MIGHT HAVE BEEN LEGITIMATED WITH EASE DURING THE LIFETIME OF LOUISE LEVY.**

The arguments of the appellant and the various amici manifest a concern for the fact that children who are illegitimate are without hope of ever attaining the status of legitimates. Under Louisiana law legitimation was open to these children and the legitimation of a child is accomplished with ease.

Had Louise Levy married the father of these illegitimate children and acknowledged them formally or informally the children would have been legitimated. Louisiana Civil Code of 1870, Article 198.

The Levy children would have enjoyed all of the rights of legitimate children had the mother married the father. The Civil Code declares that such children have the same rights as if they were born dur-



ing marriage. Louisiana Civil Code of 1870, Article 199.

Even if Louise Levy did not marry the father of the children, she could have legitimated the children by an act of legitimation passed before a notary and two witnesses. Louisiana Civil Code of 1870, Article 200; Louisiana Revised Statutes 9:391. This would have been as simple if not simpler than the act of conveying title to real property. Once legitimated these children would have had the rights of legitimate children in so far as an action for wrongful death might be concerned.

Thus, had Louise Levy married the father of these children and formally or informally acknowledged them or had she legitimated them by a simple notarial act, the children would have acquired the status so crucial in this case.

### **III. THE ILLEGITIMACY OF THE CHILDREN DID NOT PREVENT A WRONGFUL DEATH ACTION; ANOTHER PARTY WAS ENTITLED TO ASSERT RIGHTS UNDER THE STATUTE.**

The argument has been made that to refuse these illegitimate children a right or cause of action will permit the negligent tortfeasor to go unpunished. The argument assumes that if the children do not have a cause of action or right of action, that somehow the tortfeasor escapes responsibility for his actions.

The argument is without merit. Under Louisiana Civil Code Article 2315, the cause of action for wrongful death goes to the surviving spouse and child or children of the deceased. In default of these persons the action survives to the surviving father and mother of the deceased who may then make claim and punish the alleged wrongdoer.

Recognizing that in default of the children being able to assert claims herein, the mother (who is legitimate) might assert such a claim, appellant added the mother as a party plaintiff to this action. Supplemental and Amending Petition filed October 13, 1965. Record pp. 26-29. Unfortunately, for the mother of Louise Levy, this claim came more than one year after the death of Louise Lévy and hence was time barred. Louisiana's wrongful death statute sets up a peremptive as opposed to a prescriptive period of limitations. *Mejia vs. United States*, 57 F. Supp. 1015, affirmed 152 F.2d 682, cert. denied 66 S.Ct. 1366 (E. D. La. 1944); *Gabriel vs. United Theaters*, 221 La. 219; 59 So.2d 127 (1952); *Blanke vs. Chisesi*, 142 So.2d 45 (La.App. 1962). If no suit may be lodged against the alleged tortfeasor, that follows not as a result of the illegitimacy of the children, but only because suit was not timely filed by the party with a cause of action.

**POINT II.****ISSUES RAISED BY APPELLANT.**

The constitutional arguments advanced by appellant and various *amici* under the Equal Protection and Due Process clauses fall into several categories. It is claimed that the Louisiana wrongful death statute discriminates against Negroes in its requirement of legitimacy, denies persons rights of property, punishes persons on account of status, and denies fundamental human familial rights. Each of these various allegations are without merit.

**I. RACIAL DISCRIMINATION.**

Article 2315 of the Louisiana Civil Code allegedly discriminates on account of race. The argument advanced by appellant hinges upon the fact that more illegitimates are born to Negroes than to whites, that Negro children have less opportunity for adoption and that they are poor and oppressed. On the basis of these allegations, not part of the Record and subject to cross examination, appellant would have the Court view the statute as an enactment of a racial character and therefore suspect and requiring the most compelling justification. Appellant would have the Court apply the standards of *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964); *Bolling vs. Sharpe*, 347 U.S. 497, 74 S.Ct. 693 (1954); *Oyama vs. California*, 332 U.S. 633, 68 S.Ct. 269 (1948); *Korematsu vs. United States*, 323 U.S. 214, 65 S.Ct. 193 (1944), and *Hirabayashi vs. United States*, 320 U.S. 81, 63 S.Ct. 1375 (1943).

Appellees submit that there is a vast difference between the statute here under scrutiny and those involved in the cited cases. On its face the statute in *McLaughlin* sought to regulate and penalize conduct on the basis of race alone. Occupancy of a room at night by persons of the white and Negro races together was proscribed. The sole criterion under the statute was racial. *Bolling vs. Sharpe*, *supra* concerned itself with racial segregation in public schools of the District of Columbia. In *Oyama* membership in the Japanese race with Japanese ancestry was the sole criterion for permitting possible escheats of property to the state. *Korematsu* and *Hirabayashi* dealt with deprivation of liberty and property based upon membership in the Japanese race. All of these cases have a common theme. Legislation which uses race alone as a classifying criterion is proscribed or legislation which assigns specific traits or qualities to individuals on the basis of their race will be prohibited. The statute in question has none of the defects of the statutes involved in the cited cases.

Article 2315 has no history of racial discrimination. The cases cited in outlining the Louisiana jurisprudence in regard to prohibiting recovery by illegitimates do not have the slightest suggestion that the article is administered with race in mind. The statute on its face makes no mention of race. It confers a right and cause of action on all persons qualifying for its benefits regardless of their race.

Appellant would further urge that the act is a discrimination based on ancestry. No particular ances-

try such as the Japanese is singled out for special treatment. Illegitimates are not punished as criminals or moved out of their homes and relocated simply because they happen to be illegitimate. No dangerous traits or qualities are assigned to them. Louisiana asks only that persons qualify as beneficiaries under the wrongful death statute. No impediment exists prohibiting the qualification of these persons. They are subject to legitimation regardless of race or any other characteristic.

Assuming *arguendo* that the requirement of legitimacy affects Negroes more than others, that alone will not invalidate a statute. Numerous statutes and regulations affect one group more than another. Legislation by its very nature involves classification. *Rinaldi vs. Yeager*, 384 U.S. 305, 86 S.Ct. 1497 (1966); *Kotch vs. Board of River Port Pilot Com'rs*, 330 U.S. 552, 67 S.Ct. 910 (1947). The fact that Negroes may be more affected by the requirement of legitimacy does not render the statute void. The only criterion should be that the requirement of legitimacy have some relevance to a legislative purpose. *Rinaldi vs. Yeager*, *supra*.

## II. DEPRIVATION OF PROPERTY.

On behalf of the illegitimate children it is claimed that the action for wrongful death is a property right of which they are being deprived without due process of law. The statute alone confers the right to sue and it confers it upon certain beneficiaries. As administered by the courts and required by the definition of



"children" in the Civil Code, the statute confers no property right on these children, yet they claim to be entitled to this property right.

Under the provisions of Louisiana Civil Code Articles 918 and 2315 these illegitimate children may inherit whatever property right their mother had in bringing an action for her personal injuries and pain and suffering. *Succession of Baragona*, 233 La. 537, 97 So.2d 215 (1957); *Goins vs. Gates*, 93 So.2d 307 (La.App. 1957). But that issue is not before the court in these proceedings. The children have not sued in the capacity as heirs and have not qualified or been recognized as the heirs of Louise Levy. The children have sued only in their capacity as children bringing an action for wrongful death. Their rights as survivors to any action which might have been asserted by Louise Levy are not before the Court.

This Court has indicated that it prefers not to sit as a super legislature and in the name of due process or equal protection pass upon the wisdom or folly of state legislatures with regard to regulation of property rights of their citizens. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963); *Williamson vs. Lee Optical Co.*, 348 U.S. 483, 75 S.Ct. 461 (1955).

Before the statute in question may be properly invalidated as a deprivation of property it must be shown that the statute works an invidious discrimination. *Ferguson vs. Skrupa*, *supra*; *Williamson vs. Lee Optical Co.*, *supra*. No such invidious discrimination has been demonstrated.

It has been argued that under Louisiana law an employer is bound to pay compensation benefits to the illegitimate child of a deceased employee and may thereafter recover his payments in an action against the tortfeasor. The contention is to the effect that the employer has a right denied to the illegitimate child. This is not the case. The employer does not have a legal subrogation but rather has an independent cause of action. *Board of Commissioners vs. City of New Orleans*, 223 La. 199, 65 So.2d 313 (1953). The wrongful death statute and the compensation statute are different and convey different rights based on varying criteria. *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (Pa. 1962).

### III. PENALIZING THE CHILDREN.

The statute is attacked as penalizing the children because it renders them guilty without fault on their part. It is argued that the children had no hand in their creation and yet because of their status as illegitimates they are punished. An appeal is made to *United States vs. Robel*, 36 L. W. 4060 (Decided December 11, 1967); *NAACP vs. Overstreet*, 384 U.S. 118; *Robinson vs. California*, 370 U.S. 660, 82 S.Ct. 1417 (1962); *Oyama vs. California*, 332 U.S. 633, 68 S.Ct. 269 (1948).

The statute in question is not a penal statute. It does not legislate against a particular status. It does not imprison the children because of their illegitimacy or make them ineligible for employment. It seeks to

exact no penalty from the children. In fact the law of Louisiana provides for the legitimation of the children in a fairly simple manner. It grants them a limited right of inheritance. If to deny the illegitimate a cause of action for wrongful death is to penalize him, then every law of every state dealing with illegitimates and their rights of inheritance is a penal statute. The statute is a permissive one. Without it no action for wrongful death would exist. It confers rights rather than takes them away. Legislation of a necessity must classify. On the basis of classification rights are granted or withheld or taken away. The failure to grant a right to a particular class has not been construed as penalizing that class because of its status. Appellant places great emphasis upon *Oyama*. The essence of *Oyama* is that it was a classification based upon race alone without relation to a legitimate legislative purpose. As will be demonstrated, the classification employed is reasonable and related to a legitimate legislative purpose. The classification does not have the overtones of race.

#### IV. FUNDAMENTAL FAMILIAL HUMAN RIGHTS.

On behalf of the Levy children the assertion is made that they and all illegitimates are being denied fundamental familial rights. It is claimed that they have fundamental rights to a legitimate relationship with their mother.

The State of Louisiana has not taken from these children their right to a legitimate relationship with their mother. A child may be easily legitimated and will have all of the rights of a legitimate child includ-

ing the right of action for wrongful death. Illegitimates are not precluded from owning property, marrying, and living perfectly normal lives. .

It is argued that the fact that a person may be considered illegitimate works a particular hardship on that individual of a most oppressive nature affecting his health and well being. If that be so, the opinion of mankind may have been responsible for that condition, not the provisions of Article 2315. If a person has such a fundamental, almost First Amendment Right, not to be considered illegitimate, then every wrongful death statute or inheritance law employing the classification has run afoul of the Constitution.

The laws of Louisiana evidence a concern for the illegitimate. They provide for his legitimation, his subsequent inheritance, his subsequent action for wrongful death, the manner of his acknowledgment, the proof of paternity, and the proof of maternity. Louisiana has evidenced a clear concern for the rights of the illegitimate. Louisiana Civil Code of 1870 Articles 198-214, 238-245, 917-928, 1236, 1483-1488, 1496, 2315; Louisiana Revised Statutes 9:391.

**POINT III.**

**TO REFUSE TO ALLOW THE APPELLANT A RIGHT OF RECOVERY IS NOT VIOLATIVE OF THE DUE PROCESS OF LAW AND EQUAL PROTECTION OF THE LAWS REQUIREMENTS OF THE FEDERAL CONSTITUTION.**

**I. TO HOLD THE STATUTE UNCONSTITUTIONAL, THE COURT MUST FIND INVIDIOUS, PURPOSEFUL AND ARBITRARY DISCRIMINATION WHOLLY LACKING IN RATIONALITY.**

The test used to determine the constitutionality of a state statute under the equal protection of the laws or the due process clauses has evolved several criteria for the testing of state statutes. Statutes involving racial discrimination are measured by a different standard than those which do not have a system of racial classification.

The Court has held that statutes drawn according to race are patently invidious and must be supported by some overriding purpose. Where the color of skin is the sole test and distinguishing basis of classification, such statutes are manifestly unconstitutional. *Loving vs. Commonwealth of Virginia*, 388 U.S. 1, 87 S.Ct. 817 (1967); *McLaughlin vs. Florida*, 379 U.S. 184, 85 S.Ct. 283 (1964).

Where statutes, however, do not classify persons on the basis of race, such statutes must be shown to be invidious discriminations, which are intentional, purposeful, arbitrary and without reason.



*Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344 (1957) has outlined the basic constitutional guidelines to be followed in scrutinizing state statutes on equal protection grounds:

"In determining the constitutionality of the Act's application to appellees in the light of its exception of American Express money orders, we start with the established proposition that the 'prohibition of the Equal Protection Clause goes no further than the invidious discrimination.' *Williamson v. Lee Optical of Oklahoma*, 348 U.S. 483, 489, 75 S.Ct. 461, 465, 99 L.Ed. 563. The rules for testing a discrimination have been summarized as follows:

1. The equal protection clause of the Fourteenth Amendment does not take from the State the power to classify in the adoption of police laws, but admits of the exercise of a wide scope of discretion in that regard, and avoids what is done only when it is without any reasonable basis and therefore is purely arbitrary.
2. A classification having some reasonable basis does not offend against that clause merely because it is not made with mathematical nicety or because in practice it results in some inequality.
3. When the classification in such a law is called in question, if any state of facts reasonably can be conceived that would sustain it, the existence of that state of facts at the time the law was enacted must be assumed.
4. One who assails the classification in such a law must

carry the burden of showing that it does not rest upon any reasonable basis, but is essentially arbitrary.' *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 78-79, 31 S.Ct. 337, 340, 55 L.Ed. 369." 354 U.S. at 463-64.

See also *McGowan vs. Maryland*, 366 U.S. 420, 81 S.Ct. 1101, 6 L.Ed. 2d 393. (1960); *Stebbins vs. Riley*, 268 U.S. 137, 45 S.Ct. 424, 69 L.Ed. 884 (1924); *Steier vs. N. Y. State Ed. Comm.*, 271 F.2d 13 (2nd Cir. 1959); *Hanna vs. Home Ins. Co.*, 281 F.2d 298 (5th Cir. 1960); *Tullier vs. Giordano*, 265 F.2d 1 (5th Cir. 1959); *Ventre vs. Ryder*, 176 F.Supp. 90 (W.D. La., 1959); *W.M.C.A. vs. Simon*, 208 F.Supp. 368 (S.D. N.Y., 1962).

The Court will not substitute its judgment for that of a state legislature on the grounds that the Court entertains a different set of economic or social beliefs. *Ferguson vs. Skrupa*, 372 U.S. 726, 83 S.Ct. 1028 (1963).

The element of intentional or purposeful discrimination necessary to establish a denial of equal protection of the law is not presumed: *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397, 401, 88 L.Ed. 497 (1943). In *Snowden vs. Hughes*, *supra*, the Court said:

"The unlawful administration by state officers of a state statute fair on its face, resulting in its unequal application to those who are entitled to be treated alike, is not a denial of equal protection unless there is shown to be present in it an ele-

ment of intentional or purposeful discrimination . . . But a discriminatory purpose is not presumed . . . there must be a showing of 'clear and intentional discrimination' . . ." 321 U.S. at 8.

Nor will unreasonableness be presumed:

"Although no precise formula has been developed, the Court has held that the Fourteenth Amendment permits the States a wide scope of discretion in enacting laws which affect some groups of citizens differently than others. The constitutional safeguard is offended only if the classification rests on grounds wholly irrelevant to the achievement of the State's objective. State legislatures are presumed to have acted within their constitutional power despite the fact that, in practice, their laws result in some inequality. A statutory discrimination will not be set aside if any state of facts reasonably may be conceived to justify it. See *Kotch v. Board of River Port Pilot Com'rs*, 330 U.S. 552, 67 S.Ct. 910, 91 L.Ed. 1093; *Metropolitan Casualty Ins. Co. of New York v. Brownell*, 294 U.S. 580, 55 S.Ct. 538, 79 L. ed 1070; *Lindsley v. Natural Carbonic Gas Co.*, 220 U.S. 61, 31 S.Ct. 337, 55 L.Ed. 369; *Atchison, T. & S. F. R. Co. v. Matthews*, 174 U.S. 96, 19 S. Ct. 609, 43 L.Ed. 909. . . .

The record is barren of any indication that this apparently reasonable basis does not exist, that the statutory distinctions are invidious, that local tradition and custom might not rationally call

for this legislative treatment. See *Salsburg v. State of Maryland*, 346 U.S. 545, 552-553, 74 S.Ct. 280, 284, 98 L.Ed. 281; *Kotch v. Board of River Port Pilot Com'rs*, *supra*." *McGowan vs. State of Maryland*, 366 U.S. 420 at 425-427.

Appellant has shown no clear and intentional discrimination, unreasonableness or arbitrariness.

Thus, it is respectfully submitted that on the basis of the evolving history of the Fourteenth Amendment's equal protection and due process clauses every indulgence will be given a non-racial state statute as to its rationality, purpose and fairness as against a charge of invidious discrimination.

**II. THE STATUTE IN QUESTION IS NOT A RACIAL STATUTE, DOES NOT EMPLOY A RACIAL CLASSIFICATION, IS FAIR, AND EQUALLY ADMINISTERED, AND HAS A RATIONAL RELATIONSHIP TO A LEGITIMATE LEGISLATIVE PURPOSE.**

**(a) The Statute Employs No System Of Racial Classifications.**

The system of classification which is employed in Article 2315 is as to legitimates and illegitimates. The word "race" appears nowhere in the statute and there is no evidence of any intent on the part of the framers of the statute to administer it upon a racial basis. The history of the statute and its administration, as reflected in other portions of this Brief, plainly establish that this is not a racial enactment.

The two Federal Courts which have passed or commented on the classification into legitimates and illegitimates as used in Article 2315 have found no fault with the classification on constitutional grounds.

An argument as to the unconstitutionality of the distinction between persons as legitimate and illegitimate was presented in *Benjamin vs. Hardware Mutual Casualty Co.*, 244 F. Supp. 652 (W.D. La., 1965). Judge Putnam of the Western District of Louisiana declared:

"In addition to the argument as to the status of these minors plaintiffs urge that Article 2315 of the Civil Code should be declared unconstitutional inasmuch as it discriminates against illegitimate children and does not afford them an opportunity to sue for the wrongful death of their natural parent, while it does afford this right to legitimate children. Without discussing the obvious error in this position, suffice it to say that this statute is not under attack in this proceeding. If by some legal alchemy plaintiffs have developed a new field in the matter of civil rights litigation, it should be properly raised in a suit filed for that purpose." 244 F. Supp. at 653.

The Court of Appeals for the Fifth Circuit passed upon the very issue raised in this matter in June of 1967 in *Glona vs. American Guarantee and Liability Ins. Co., et al.*, 379 F.2d 545, cert. granted December 4, 1967 (5th Cir. 1967). The case expressly declared that the classification of persons into legiti-



mate and illegitimate for the purpose of Article 2315 of the Louisiana Civil Code was a reasonable legislative classification.

In the *Glon* case, a mother sued for the wrongful death of her son who was illegitimate but was informally recognized by her. Passing upon the issue of legitimacy, the court declared:

"As to plaintiff's argument that the construction by the Louisiana courts of Article 2315, Civil Code of Louisiana, so restricts said provision that it violates the equal protection clause of the Fourteenth Amendment, this Court is clear to the conclusion that the Fourteenth Amendment does not prohibit States from classification but only prohibits classification upon an unreasonable basis. It cannot be said that the classification here by the Louisiana courts is unreasonable. *Morey vs. Doud*, 354 U.S. 457, 77 S.Ct. 1344, 1 L.Ed.2d 1485." 379 F.2d at 546.

**(b) The Statute Is Related To A Legitimate Legislative Purpose.**

In Louisiana, perhaps more than any other state, rights in property are connected with family status. This is part of the Civil Law and the legislature of Louisiana is entitled to pursue policies which tend to protect and foster a legal system wherein property rights and family relationships are connected. Rights in family confer rights in property.

A cursory study of Book I of the Louisiana Code entitled "Of Persons" demonstrates the all important role of status in the Louisiana legal system. A study of Title I entitled "Of Successions" and Title II "Of Donations Inter Vivos and Mortis Causa" of Book III demonstrates the connexity between rights in property and family status.

The policy of the state is to encourage and preserve the legitimate familial relationships. In Louisiana the marital institution is encouraged and protected. The Civil Code considers marriage as a civil contract and prescribes the requirements as to participants, performance and legality of relations. Civil Code Articles 86-137.

The institution of community property, whereby the joint effort of husband and wife is promoted, supports the importance of the marital institution. The division of property into separate and community property evinces a legislative support for a strong marital institution. Morrow, Matrimonial Property Law in Louisiana, 34 Tul. L. Rev. 3 (1959). The protection of the widow through usufruct lends support to the marital institution. Oppenheim, One Hundred Fifty Years of Succession Law, 33 Tul. L. Rev. 43 at 46 (1958). Common law marriages being unrecognized evidences a support of the marital institution and a concern for status. Civil Code Article 90 et seq.; *Humphreys vs. Marquette Cas. Co.*, 95 So.2d 872, amended 235 La. 393, 103 So.2d 909 (1958), *Chivers vs. Couch Motor Lines*, 159 So.2d 544 (La.App. 1964). But the

law of Louisiana is quick to protect the innocent in a putative marriage situation and award an innocent party appropriate status for his or her protection. Civil Code Articles 117,118 Note, Tul. L. Rev. 551 (1957).

The divorce laws of Louisiana are likewise stringent. Civil Code Articles 138-145; Louisiana Revised Statutes 9:301 et seq.; Comment, Divorce in Louisiana: Grounds and Defenses, 24 Tul. L. Rev. 443 (1950).

The Civil Code defines the rights of and classifies children. It defines the reciprocal duties of parent and child. Civil Code Articles 178-245. The father, almost like a Roman *pater familias* is responsible for the acts of his children, his servants and the community between himself and his wife. Civil Code Articles 237, 2318, 2320, 2409-2410.

The tutorship and care of minors is an important concern of the law. Civil Code Articles 246-364.

The law looks to protection of the rights of legitimate relationships. Illegitimates are not permitted to inherit in the same manner as legitimates. Oppenheim, *supra* at 50. An illegitimate child may not interfere with the rights of a legitimate relation. Civil Code Articles 200,918. *Evans vs. United States*, 100 F. Supp. 5 (W.D. La. 1951).

The Code provides for a system of proof of legitimate filiation. Civil Code Articles 193-197. It provides for a system of legitimating children and for their

protection and care. Civil Code Articles 198-212, 238-245.

Perhaps the most important consideration of all is the institution of forced heirship, which prevails in Louisiana. Dainow, *The Early Sources of Forced Heirship; Its History in Texas and Louisiana*, 4 La. L. Rev. 42 (1941). With regard to forced heirship, status is all important. Pursuant to forced heirship, only certain legitimate relations may inherit. Civil Code Articles 1493-1495. They cannot be disinherited except for grave cause. Civil Code Article 1617. Louisiana has seen fit to protect and preserve the rights of these legitimate relations against encroachment. Where testacy is severely limited, by nature a system of family law based upon status is important.

The Civil Code evidences a policy of protecting the rights of legitimate relations in patrimony and caring for the legitimate relations of a person ahead of all others. The state requires that proof of legitimacy or status be established in certain very definite ways. The Legislature protects the legitimate relation against the claims of alleged illegitimates.

To allow persons, who may claim to be the offspring of persons deceased and to thereby claim legal rights, would invite chaos in a system where certainty is required. The problem of proof or disproof, as the case might be, would be difficult. The door to dishonest claims would be opened and the evidence needed to disprove claims of alleged illegitimates would doubtlessly lie with the deceased.

Louisiana has a unique legal system wherein rights in property are closely tied to legitimate family relations. Thus, it is submitted that the requirement of legitimacy in a wrongful death action is a part of a legitimate legislative purpose in a state where rights in property are so closely tied to familial status.

Louisiana has recognized the problem of illegitimacy. It has provided means for the illegitimate child to become legitimated. It has provided certain protections for the illegitimate. Louisiana has not turned a deaf ear to the rights of illegitimates, but has recognized the social interest in protecting illegitimates in a system where status is so important. It has provided the means whereby an illegitimate may obtain proper status.

However, Louisiana also has a social interest in preserving its legal system wherein rights in family and rights in property are so closely tied. The Legislature in protecting the illegitimate and giving him the opportunity of becoming legitimate has recognized its social duty. It has struck a balance of the competing social interests which is in no way discriminatory, unreasonable, or arbitrary.

**(c) Many States Require That A Beneficiary Be A Legitimate Relative In Order To Sue For The Wrongful Death Of Another Person.**

Some states permit only a legitimate child to sue for the wrongful death of a parent. Several states will not allow an illegitimate minor to sue for the



wrongful death of its mother. According to *Corpus Juris Secundum*, "where specified relatives of a decedent are indicated as beneficiaries, only the actual and legitimate relatives to whom the act applies are entitled to the benefits of the act. Such provisions do not embrace illegitimate kindred without express mention." 25A C.J.S. Death § 35. See also 22 Am. Jur. 2nd § 65.

Some states prohibit illegitimate children from recovering on account of the death of either parent. Other states prohibit the illegitimate from recovering only in the event of the demise of the father and allow a recovery for the death of the mother. Tennessee will permit a recovery for the demise of the mother but not of the father. TCA 20-607; *Dilworth vs. Tisdale Transfer and Storage Co.*, 354 S.W.2d 261 (Tenn. 1962).

Until recently, Georgia did not allow illegitimates to recover for the death of their parents. However, by statute, Georgia has now permitted an illegitimate child to recover for the death of its mother only. Georgia Code 74-204. Historically, Georgia did not permit illegitimates to recover for the death of either mother or father. *Brinkley vs. Dixie Construction Co.*, 205 Ga. 415, 54 S.E.2d 267 (note breadth of decision), Answer to certified question conformed to 54 S.E.2d 510 (1949); *Adams vs. Powell*, 67 Ga. 460, 21 S.E.2d 111 (1942). Maryland, historically, denied illegitimates any right of action for the death of a parent. But recently, by statute, Maryland has allowed an illegitimate child to sue for the death of its mother but

not of its father. Maryland Code Art. 67 § 4. *State for Use of Holt vs. Try, Inc.*, 152 A.2d 126 (Md. App. 1959); *Washington B. & A. R. Co. vs. State*, 136 Md. 103, 111 A. 164 (1920). South Carolina held the traditional view that no illegitimate child might sue. However, by statute, South Carolina now permits an illegitimate to sue for the wrongful death of its mother only. South Carolina Code 10:1953. *Smith vs. Atlantic Coast Line R. Co.*, 212 S.C. 332, 47 S.E. 2d 725 (1948). Texas permits an illegitimate to sue for the wrongful death of its mother but not of its father. Vernon's Ann. Tex. Civ. St. Arts. 4671, 4675; *Jones vs. SS Jessie Lykes*, 253 F.Supp. 368 (E.D.Tex., 1966); *Deathredge vs. Fort Worth and D.C.R. Co.*, 154 S.W.2d 918; *Goss vs. Fanz*, 287 S.W.2d 289; *H. & S.A. Ry. Co. vs. Walker*, 106 S.W. 705.

By contrast there are a number of states such as Louisiana which by the breadth of their decisional law and the linking of the action for wrongful death to the laws of heirship would prohibit any illegitimate child from seeking recovery for the death of either parent. Pennsylvania would not allow an illegitimate child to sue for the death of either parent. 12 P.S. Pa. § 1601-1604; *Bullock vs. Sinclair Ref. Co.*, 160 F. Supp. 300 (E.D. Pa. 1958); *Frazier vs. Oil Chemical Co.*, 407 Pa. 78, 179 A.2d 202 (1962); *Molz vs. Hansell*, 115 Pa. Super. 338, 175 A. 880 (1934); *Kemmerer vs. Reading Co.*, 64 D. & C. 433, 23 Lehigh L. J. 5. New Jersey it would appear would not allow an illegitimate to sue for the death of either father or mother. Statutes 3 A:4-7; *De Medio vs. Fort Norris Express Co.*,

71 N. J. Super. 190, 176 A.2d 550 (N.J. 1961); *Hammond vs. Penn. R. Co.*, 148 A.2d 515 (N.J. 1959).

Because of the link between inheritance laws and the action for wrongful death New York would not permit a suit by an illegitimate. *Hiser vs. Davis*, 194 N.Y.S. 275, 201 App. Div. 213 Aff'd. 234 N.Y. 300, 137 N.E. 596 (1922). In Indiana a suit would probably not be allowed. *McDonald vs. P.C.C. & St. Louis R. Co.*, 144 Ind. 43 N.E. 447 (1896) (Dicta).

Many states have not passed upon the issue. What their ruling is cannot be ascertained at this time. A number of states, of course, class the beneficiaries who may bring the action for wrongful death in accordance with the inheritance laws of that particular state. The rights of illegitimates to sue in these states are, of course, therefore, dependent upon the laws of inheritance of the particular state.

Under the Federal Employers' Liability Act, local law will determine whether or not a child may sue and if the local law bars an illegitimate, then such child will have no right of action under the Federal Employers' Liability Act. *Hammond vs. Pennsylvania R. Co.*, 54 N.J. Super. 149, 149 A.2d 515, rev'd on other grounds 31 N.J. 244, 156 A.2d 689. A claim by a Louisiana illegitimate under the Federal Tort Claims Act has been denied on account of illegitimacy. *Evans vs. United States*, 100 F. Supp. 5, (W.D. La. 1951). Congress has acquiesced in this view of the statute.

The classification of persons into legitimates and illegitimates is not an unreasonable classification when considered in the light of history. Many states require legitimacy with regard to their laws of inheritance. Other states will not permit illegitimates to recover for the death of their father. Some states will not permit illegitimates to recover for the death of either the mother or the father.

The laws with respect to the rights of illegitimates are in a state of flux. The fact that all states are not in accord with regard to the rights of illegitimates certainly establishes the reasonableness of the classification.

It is respectfully submitted that Louisiana does not stand alone and other States and legislatures are in accord with the Louisiana view that illegitimates may not sue for the wrongful death of a parent.

### **III. THE REQUIREMENT OF LEGITIMACY IS REASONABLY RELATED TO A PROPER LEGISLATIVE PURPOSE.**

The Wrongful Death Statute of Louisiana should not be read in isolation. It should be considered in the light of the over-all and overriding unstated major premises of the legal system. The state has evolved a system of legal institutions wherein rights in property in large part depend upon familial status. Article 2315 is part of the entire legal scheme of the state. It should not be considered *in vacuo*.

To permit illegitimates to recover under the Wrongful Death Statute would be to imperil the system of forced heirship so important in Louisiana's legal system. The action for wrongful death and the laws of descent and distribution have an unusual closeness. The thinking employed by appellant and the *amici* to justify allowing recovery for illegitimates could likewise be used to alter the system of forced heirship, community property and the relation between property and family. No title to real property in Louisiana could be certain where illegitimates had the same rights as legitimates.

Thus, when provisions of Article 2315 are considered in the light of the legal system prevailing in Louisiana, the requirement of legitimacy is reasonably related to a legislative purpose.

#### POINT IV.

**THE EQUAL PROTECTION CLAUSE AND THE DUE PROCESS CLAUSE SHOULD NOT BECOME A VEHICLE WHEREBY THE NATIONAL GOVERNMENT MIGHT UNDERTAKE TO REGULATE MATTERS OF HISTORICAL STATE CONCERN ONLY.**

The action for wrongful death in the United States is a matter which has been historically within the province of state governments. It is true that various federal statutes do regulate the action for wrongful death with respect to matters within the cognizance of the national government. However, the action for wrongful death and the content of the Common Law



and the Civil Law have been matters left to the states. The laws of inheritance and descent and distribution have been the exclusive concern of the states. Matters of family law in general have been reserved to the competence of state courts and legislatures. It is not the intention of the Fourteenth Amendment or for that matter the Civil Rights Act to become a vehicle whereby the national government might undertake to govern matters of historical, exclusive state cognizance. *Snowden vs. Hughes*, 321 U.S. 1, 64 S.Ct. 397 (1944); United States Constitution Amendment X.

**CONCLUSION.**

For the reasons stated above, the appeal herein should be dismissed and the judgment below affirmed.

Respectfully submitted,

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**CERTIFICATE.**

I HEREBY CERTIFY that a copy of the above and foregoing Brief has been served upon Mr. Adolph J. Levy and Mr. Lawrence J. Smith, 1407 Pere Marquette Building, New Orleans, Louisiana, by depositing same in the United States Post Office, first class, postage prepaid, addressed as above this .... day of January, 1968.

I FURTHER CERTIFY that copies of the above and foregoing Brief have been served upon Mr. Norman Dorsen, 40 Washington Square, South, New York, New York 10003, and upon Mr. Melvin L. Wulf, 156 Fifth Avenue, New York, New York 10010, by depositing same in the United States Mailbox, Air Mail postage prepaid, addressed as above, this .... day of January, 1968.

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